

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA :
 :
 v. :
 :
 DAVID VEGA MOLINA : **Cr. 99-295 (DRD)**

**DEFENDANT'S OBJECTIONS
TO REPORT AND RECOMMENDATION
ON HIS MOTION TO DISMISS COUNT IV OF THE INDICTMENT**

TO THE COURT:

DEFENDANT, David Vega Molina, hereby serves his objections to the Magistrate's Report and Recommendation filed on September 28, 2005, on Motion for an Order dismissing Count IV of the Indictment on the grounds and for the reasons that follow:

1. Defendant objects to the court's adoption of the Court of Appeals' language with respect to the appropriate remedy for plain error on appellate review (instructing the district court to sentence as if defendants whose convictions were upheld had been convicted for violation of 18 U.S.C. §371) to his Motion to Dismiss before the District Court.

The Magistrate and District Court do not have a case of plain error review before them, but a Motion to Dismiss which must be decided on its merits. If Count IV of the indictment, as it stands, violates the Ex Post Facto Clause, as it does, it must be dismissed. Period.

It is both premature and inappropriate for this Court to recommend to the prosecution how to improve its position, and to prejudge any of its alternatives and any defense response.

2. Defendant objects to the suggestion that "the Government may move to **amend** the indictment . . .," to the extent it suggests that it would accept any charge not fairly and adequately presented to a grand jury, in violation of defendant's Fifth Amendment right not to be tried except upon indictment by a grand jury. See also, F.R.Cr.P. Rule 7(a) and (e). The suggested "amendment" is substantive, in that it would charge a different offense, and is for a felony, not a misdemeanor offense.

3. Defendant objects to the suggestion that the prosecution may now present an indictment for violation of 18 U.S.C. §1203(a) as written at the time of the offense because the no grand jury, apprised of the evidence presented at first trial and properly instructed, could indict this defendant for that offense.

WHEREFORE, Defendant OBJECTS to the Report and Recommendation as written, requests that it be amended consistent with the objections contained herein, and conclude that that COUNT FOUR OF THE INDICTMENT BE DISMISSED WITH PREJUDICE.

CERTIFICATION

I hereby certify that on this date, the foregoing was electronically filed with the Clerk of the Court via CM/ECF system, which will cause a copy to be electronically served upon all counsel of record.

Respectfully submitted:

October 5, 2005

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